In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 716

MEDO CALZAVARA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner and two co-defendants were convicted by a jury, in the United States District Court for the Northern District of Illinois, of transporting stolen goods in interstate commerce and of conspiracy, in violation of 18 U.S.C. 2314 and 371. Petitioner was sentenced to imprisonment for ten years on the substantive count and five years on the conspiracy count, the terms to run concurrently. The sentence was re-

duced to eight years on October 27, 1965 (Pet. App. C, p. 5).

On appeal, all of the defendants belatedly urged (by supplemental brief) that the trial court had committed reversible error in permitting the jury to separate overnight during its deliberations, relying on the then recently decided case of *United States* v. *D'Antonio*, 342 F. 2d 667 (C.A. 7). The court of appeals rejected this contention on the ground that the record established that counsel for each defendant at trial, including petitioner's counsel, had agreed to the jury-separation procedure outlined and followed by the trial court. *United States* v. *DiFronzo*, 345 F. 2d 383, 385 (C.A. 7). Petitioner and co-defendant DiFronzo filed petitions for certiorari, contending, *inter alia*, that the court erred in permitting the jury to go home overnight during its deliberations. This Court denied the writ. 382 U.S. 829.

On November 29, 1965, the Seventh Circuit, in *United States* v. *Panczko*, 353 F. 2d 676, held, in effect, that separation of the jury over defense objection was, without more, reversible error. Thereafter, petitioner filed the present motion to vacate his sentence under 28 U.S.C. 2255, complaining that there had been a separation of the jury over counsel's objection (Pet. App. B, pp. 2-4). The district court denied the motion without a hearing, stating that the record showed that there was no objection by counsel for petitioner and that the objection made by DiFronzo's counsel was impliedly withdrawn during

subsequent discussions (Pet. App. C, pp. 5-7). The court of appeals affirmed (Pet. App. A).

The question presented in this case—*i.e.*, "whether the record demonstrates that Petitioner's objections to the separation [of the jury] were preserved at the trial level" (Pet. 5)—was raised and decided adversely to petitioner on direct review. There is no reason why it should be reconsidered on collateral attack. See *Frye* v. *United States*, 337 F. 2d 385, 386 (C.A. 7); *Davis* v. *United States*, 311 F. 2d 495 (C.A. 7), certiorari denied, 374 U.S. 846; *Franano* v. *United States*, 303 F. 2d 470, 472 (C.A. 8), certiorari denied, 371 U.S. 865.

As we pointed out in our brief in opposition to petitioner's earlier petition for certiorari (Nos. 286 and 287, October Term, 1965, pp. 4-9), it was DiFronzo's counsel, not petitioner's, who had initially objected to separation of the jury. Nothing in the record suggests that one counsel's objection, in an informal conference with the court outside the presence of the jury, would be treated as an objection by all counsel. Moreover, discussions with the trial court at an evening session on the day of the initial objection by DiFronzo's counsel indicated (as both courts below found) that all counsel ultimately agreed to the jury-separation procedure. Thus, when the judge, after outlining the procedure he planned to follow, expressly asked whether there were any objections, DiFronzo's counsel raised only one minor objection; neither he nor anyone else objected to the

jury's separating (B.A. 9a-10a).[1] The district court properly construed this conduct as "agreement with the Court and withdrawal of the objection" (Pet. App. C, p. 7). Indeed, at least as to petitioner, the record reflects express consent to the separation procedure.[2]

There is no substance to petitioner's suggestion that the court of appeals did not consider the record on direct appeal when it held that counsel for all defendants agreed to the procedure used (Pet. 2). Briefs for both sides (see n. 1, *supra*) pointed out all relevant parts of the record for the court to consider, including the initial objection by DiFronzo's counsel. The court obviously accepted the government's argu-

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[1] "B.A." refers to the Addendum to the government's brief in the court of appeals, which we are lodging with the Clerk of this Court. In this brief are reprinted the portion of petitioner's supplemental brief on direct appeal in which the jury-separation issue was first raised (pp. 5-6), and the government's supplemental brief and appendix filed on direct appeal in response to the jury-separation contention (pp. 1a-15a).

[2] Mr. Callaghan, who represented DiFronzo at the trial and represented petitioner on direct appeal, spoke on behalf of petitioner at the evening session, after the court had outlined, and counsel had agreed to, the jury-separation procedure (B.A. 11a):

> Mr. Callaghan: I might suggest to the Court so the record is clear that Mr. Daly is not here [tonight] representing Mr. Calzavara. He had to go home. I speak for Mr. Calzavara in Mr. Daly's absence. For Mr. Calzavara, Mr. Calzavara consents to that proceeding.
>
> The Court: Is that correct, Mr. Calzavara?
>
> The Defendant Calzavara: Yes, sir.
>
> The Court: All right, Mr. Marshal, bring in the jury, please.

ment that agreement to the procedure used could reasonably be inferred from the subsequent discussion between the court and counsel. The district court reached the same conclusion on this motion under 28 U.S.C. 2255.

Nor is there merit in the contentions (Pet. 2) that the district court should have held a hearing on the Section 2255 motion or required the government to respond and that the court of appeals dismissed the appeal without assigning reasons therefor. The issue raised in the district court was susceptible of resolution on the basis of the trial record alone. And the court of appeals' statement that the denial of the motion was supported by the record and the law constituted a sufficient statement of the reasons for affirmance, if one was required—particularly where the district court had specified in some detail its reasons for denying the motion.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

NOVEMBER 1966.

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